IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04/04/2003

CORAM

The Hon'ble Mr. Justice P. SHANMUGAM
and
The Hon'ble Mrs. Justice PRABHA SRIDEVAN

Appeal Suit No.153 of 1989

N. Shanmugham ..... Appellants

-Vs-

1. Rathinam @ Rathinavelayudham (died)
2. Ranganayaki
3. Pushpaganthi
4. Janardhanan
5. Minor Rathinavel Kamarajan
(rep. by father and guardian
fourth respondent)
6. Anandavalli
7. Suvasavathy
8. Pachavarnam
9. Uma Parvady

(R-4 & R-6 to R-9 recorded as
L.Rs. of the deceased first
respondent; R-4 recorded as
L.R. Of the deceased second
respondent; and R-6 to R-9
brought on record as L.Rs. of
the deceased second respondent
as per the order of the Court
dt. 25.3.2003 made in CMP Nos.9229
to 9231 of 2001 by PSMJ & PSDJ) .. Respondents

PRAYER : Appeals against the judgment and decree dated 12.12.1988 made in O.S. No.326 of 1987 on the file of the Sub-Court, Pondicherry.

!For Appellants : Mrs. Hema Sampath

^For Respondents : Mr. T.R. Rajagopalan,
Senior Counsel for
Mr. T.R. Rajaraman (For R-4).

:J U D G M E N T

P.SHANMUGAM, J.

Defendant is the appellant. The suit for specific performance was decreed and the appeal is against this judgment and decree.

2. The parties are described as per their rankings in the trial court.

3. The first plaintiff, for his and on behalf of the four plaintiffs, entered into an agreement dated 13.12.1984 for the purchase of an extent of 20.40 acres of land for a consideration of Rs.3,57,500/-. A sum of Rs.50,000/- was paid as advance on that day. As per the terms of the agreement, the defendant had to obtain, at his expense, Government permission to sell the land, income tax clearance certificate and encumbrance certificate, within a period of one year from the date of the agreement. It was further agreed that during that period, the defendant had to get the tenants evicted at his expense and hand over possession of the property at the time of the sale. In the event of the defendant's failure to get vacant possession of the property, the agreement holder, namely the first plaintiff, was entitled to retain a sum of Rs.50,000/- out of the balance sale consideration and get the sale deed executed and registered. If the defendant failed to evict the tenants within a period of six months thereafter, the plaintiff was entitled to deduct the expenses from the retained amount of Rs.50,000/- for getting the tenants evicted. The plaintiff would have to forego the advance amount of Rs.50,000/- if he failed to take the sale deed while the defendant was ready to fulfill his part of the contract. In case the defendant failed on his part to give effect to the agreement, the plaintiff was entitled to seek the remedy of specific performance. The defendant, in the meanwhile, should not subject the property to any encumbrance. In case the Government refused to grant permission, the defendant had to return the advance amount of Rs.50,000/- with interest at the bank rates for fixed deposits. While steps were being taken to comply with the conditions of the agreement, the defendant received a further sum of Rs.25,000/- on 16.11.19 85 and a supplementary agreement dated 26.12.1985 was entered into, by which it was agreed to read both the agreements together. Under the second agreement, a further sum of Rs.32,500/- was paid to the defendant, taking the total sum paid towards consideration to Rs.1,07,50 0/-. As per the supplementary agreement, it was agreed that after giving credit to Rs.50,000/-, the remaining sale consideration of Rs.2,00,000/- be retained by the first plaintiff to be paid with interest at the rate of 12% per annum on the date of execution of the sale deed.

4. According to the plaintiffs, while they were co-operating and rendering all assistance to the defendant in obtaining permission, the defendant, with an ulterior motive, was delaying in furnishing the requisite information to the competent authority. Ultimately, he came forward with a letter dated 4.2.1987 in which, while admitting the agreements, expressed his inability to get the necessary permission from the competent authority and

requested the plaintiffs to receive back the advance amount and cancel the agreement. The first plaintiff, in his reply dated 12.2.1987, sought the communication or the order of refusal by the competent authority. Later, the communication of the competent authority dated 3.3.1986, which was received long ago, was disclosed. The defendant was informed thereunder that the request for permission could be considered only after filing the statement of land holding in Form-I. According to the plaintiffs, the defendant, in order to avoid the agreement and with an ulterior motive to sell the properties to third parties for a higher consideration, was trying to set up a case of refusal by the competent authority. According to him, he came to know that the defendant had unilaterally addressed the competent authority without the knowledge of the plaintiffs. In the above circumstances, the plaintiffs issued a notice dated 27.4.1987 calling upon the defendant to discharge the obligations under the contract, for which the defendant ca me with a reply that his steps to get the permission could not succeed inspite of his best efforts besides claiming that his sons were also having a share in the property. After finding that the defendant is trying to avoid and defeat the contract, the above suit came to be filed for a specific performance.

5. The defendant did not dispute the execution of the agreement and receipt of the advance amount totalling Rs.1,07,500/- as well as the various terms of the agreement. According to him, he was unable to live up to the agreement since the Government did not grant the permission inspite of his efforts to get the permission and to file the suit for getting the tenants evicted. He had alleged that while he was always ready and willing to perform his part of the contract, it is only the first plaintiff who had delayed in handing over the affidavit to him to get the necessary clearance under the Urban Land Ceiling Enactment. In the light of the communication of the competent authority, he had no other alternative but to seek for cancellation of the agreements. He has further stated in his written statement that since the authorities concerned decided to take a portion of the land on the ground that it was excess, he has submitted his objection and had also stated that he had decided to sell the property in favour of his sons and daughters and he therefore withdrew all his applications seeking permission to alienate the suit property. According to him, for settling the lands in their favour, a road is required to reach their respective properties and therefore, he had set apart an extent of 126.25 x 3.05 meters of land and public road, in which case the land would not come within the ceiling limit. He has stated that he had not violated the terms and conditions of the agreement. He has further pleaded that plaintiffs 2 to 5 are unnecessary parties to the suit and has denied the allegation of motive in not getting permission from the competent authority and also the allegation of sale to third parties.

6. On the above pleadings, the learned Principal Sub Judge, Pondicherry has framed the following issues :-
(1) Whether the plaintiffs are entitled to claim specific performance of agreement?
(2) Whether defendant is liable to deliver possession?
(3) Are the plaintiffs entitled for permanent injunction as prayed for?
(4) Whether the agreements between plaintiff and defendant have

become frustrated on account of act of state and pending A.S.?
(5) Whether proper court fee is paid by plaintiffs for all reliefs?
(6) To what relief are the parties entitled?

7. The fourth plaintiff had examined himself as P.W.1. The Tahsildar was summoned to give evidence as P.W.2. The defendant examined himself as D.W.1. The trial court marked Exs.A.1 to A.12 on behalf of the plaintiffs and Exs.B.1 to B.8 on behalf of the defendants, besides Exs.X.1 to X.5 marked on the instructions of the court. The learned Principal Sub Judge, Pondicherry answered all the issues in favour of the plaintiffs and granted a decree. The appeal is against this judgment and decree.

8. Learned counsel Mrs. Hema Sampath appearing on behalf of the appellant submitted that the contract has become impossible of being performed. In the light of the Full Bench decision in GOPIRATHANAM P. VS. FERRODOUS ESTATE (PVT.) LTD. [1999 (II) C.T.C. 181], the decree ought not have been granted. According to her, the court below had failed to frame the issue as to whether the plaintiffs were ready and willing to perform their part of the contract and answer the same and the court below had also failed to see that the plaintiffs had not issued any notice calling upon the defendant to execute the sale deed inspite of the land ceiling order. She emphasized that as far as the defendant is concerned, but for his inability to get the permission from the Government, he would have performed his part of the contract. Learned counsel further pleaded that when the defendant could not get the clearance, in order to save the land from acquisition, he had decided to convey the same to his children and had sought for withdrawal of his application seeking permission to sell the land. She has further submitted that when the performance of a contract depended on the conditions contained thereunder, a specific relief cannot be granted and therefore, prayed for setting aside the decree of the court below.

9. Mr. T.R. Rajagopalan, learned senior counsel appearing on behalf of the respondents, on the other hand, submitted that the appellant has come forward with an inconsistent case only to avoid the contract. It is not the case of the appellant that he was holding excess land. The case of the appellant all through was that the holding comes within the ceiling limit and the filing of application under Section 2 6(1) of the Urban Land (Ceiling and Regulation) Act, 1976 (Central Act 33 of 1976) pre-supposes that the lands are within the ceiling limit. According to him, the appellant deliberately delayed the processing of the application initially and subsequently filed the application and did not communicate the order of the competent authority who did not reject the application, but only stipulated consideration after the furnishing of Form-I. The appellant had preferred Writ Petition No.11620 of 1987 and this Court, by order dated 27.1.1997, set aside the order of the

competent authority and remanded the matter and by that time, the Ceiling Act was repealed. Hence, according to the learned senior counsel, there is no bar for the grant of the decree.

10. We have heard the counsel and considered the matter carefully.

11. The main point that arises for consideration in this appeal is whether the contract has become impossible of performance.

12. The fact that the first plaintiff and the defendant had entered into an agreement dated 13.12.1984 and a supplementary agreement dated 26.12.1985 for the sale of the suit property is not in dispute. The agreement contemplates permission from the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 and other conditions like income tax clearance and vacating the tenants from the premises. The defendant had obtained the income tax clearance and had also filed a suit for vacating the tenants. The case of the appellant is that inspite of his strenuous efforts to get the Government permission under the Ceiling Act, his request was negatived and as per the terms of the agreement, he had to return the advance with interest at the rate of bank deposit and therefore, he called upon the plaintiffs to cancel the agreement.

13. Applications were made by the first plaintiff and the defendant in January, 1986. They are marked as Exhibits X.1, X.2, X.3, X.4 and X.5 dated 6.1.1986, 17.1.1986, 13.1.1986, 27.1.1986 and 30.1.1986 respectively. These applications were returned by the letter dated 3.3.1986, Ex.E.7, asking the defendant to file statement of his land holdings. Thereafter, the defendant filed a statement, Ex.A.7 on 7.4.1 986 and on that basis, the notification under Section 10(1) of the Act dated 17.10.1987 was issued holding that there is an excess of 3 ares and 89 santhiar (389 sq.mts.) in R.S. No.283/3 Part. As against this notification, the defendant filed Writ Petition No.11620 of 1987 and the same was disposed of by this court by an order dated 27.1.199 7 and the matter was remanded back.

14. The defendant had filed an affidavit dated 19.11.1987 in support of the writ petition, wherein he had taken a specific stand that he owned 1780 sq.mts. of vacant land and that the ceiling Act would not apply. He had pleaded in the affidavit that two of the four items were given to him by his late father and that the remaining two items were acquired by him in his wife's name and that an extent of 2087 sq.mts. is used as agricultural land. Besides, he stated that he has got buildings covering an area of 100 sq.mts. and therefore, that part of the building and the land appurtenant thereto ought to be exempted from the holdings. According to him, the declaration of the competent authority in the order dated 10.3.1987 declaring 389 sq.mts. as an excess land is ex facie illegal since they have failed to consider the buildings and the land. Instead, only the vacant land has been taken into account. He has also stated as follows :-

"In fact, the land in question is agricultural land. There is a coconut farm on the land and as such, the land is liable to be excluded from the total land holding under the Urban Land Ceiling Act. We have contended that this should be excluded, but this aspect has not been taken into account."

A learned Judge of this court, by order dated 7.1.1997, disposed of the writ petition directing the Ceiling Authorities to consider the case whether the lands come within the purview of the definition ' urban land'. By the Urban

Land (Ceiling and Regulation) Repeal Ordinance 1999, the Urban Land (Ceiling and Regulation) Act, 1976 had been repealed. Section 3 of the Ordinance saves such of those lands which were deemed to have been vested in the State Government under Subsection (3) of Section 10 of the principle Act, but the possession of which has not been taken over by the State Government. Section 4 says that all proceedings relating to any order made pending the same shall abate.

15. The relevant provisions of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the Act) can now be looked into for a better appreciation. There is no bar for transfer of the lands within the ceiling limit as per Section 5 of the Act. If there is any transfer of vacant land by a person who held the land in excess of the ceiling limit, the extent of land so transferred shall also be taken into account in calculating the extent of vacant land held by such person and the excess vacant land in relation to such person shall be selected out of the vacant land held by him after such transfer and in case the entire excess vacant land cannot be so selected, the balance, or where no vacant is held by him after the transfer, the entire excess vacant land shall be selected out of the vacant land held by the transferee. Sub-section (2) bars transfer of the excess vacant land so selected. Sub-section (3) of Section 5 bars the transfer of any land in excess of the ceiling limit until he has furnished a statement under Section 6 and a notification regarding the excess vacant land had been published. Section 26 of the said Act contemplates notice to be given before transfer of a vacant land within the ceiling limit. On such notice, the competent authority shall have the first option to purchase such land and the said option shall have to be exercised within 60 days from the date of receipt of the notice, failing which it shall be presumed that the competent authority has no intention to purchase such land and it shall be lawful to the person to transfer such land to whomsoever he liked. The definition of ' vacant land' under Section 2 excludes land not being land mainly used for the purpose of agriculture and also land on which construction of a building is not permissible under the building regulations and in an area where there are building regulations, the land occupied by any land which has been constructed and the land appurtenant to such building has to be excluded. The agreements were of the year 1984, whereas the Ceiling Act came into force on 17.2.1976 and returns were filed or were pending on the date of the agreements. Therefore, understandably, the parties have understood and proceeded on the basis that the land in question is within the ceiling limit and that the said land will not attract the provisions of the ceiling limit. The contemplation of application under Section 26 of the Act pre-supposes that the lands are within the ceiling limit. Assuming for the sake of argument that the defendant holds excess land, there is no absolute bar in transferring such land. Further, as against the order holding 389 sq.mts. as excess, the petitioner had filed the writ petition, obtained a stay in W.M.P. No.17008 of 1987 dated 23.11.1987 and ultimately got the matter remanded for fresh consideration, the Ceiling Act itself having since been repealed. As per the repealing Act, insofar as the lands which were not taken possession of, all proceedings taken under the principle Act shall abate.

16. Therefore, the plea of the respondents that there is impossibility of performance of the agreement has no substance. Obviously, the said plea is taken as an after-thought. From the facts, it is seen that the defendant had not applied for the permission immediaetly after the first sale agreement dated 13.12.1984. The application came to be filed only in the year 1986 and though the application was not rejected, it was returned with the endorsement that the defendant's request for grant of clearance could not be considered as the land in transfer was covered by the Urban Land Ceiling Act. However, it was stated that his request would be considered only after his filing the statement of his land holding in Form-I. P.W.2, the Tahsildar, has stated in his evidence that they have not rejected the application of the defendant, but they have only asked him to file the statement of his land holding. In the affidavit filed along with the notice under Section 26, he has stated that the vacant land belongs to him and that he holds the land within the ceiling limit as laid down by the Urban Land (Ceiling and Regulation) Act, 1976. The defendant, while calling upon the plaintiffs to cancel the agreement by his notice dated 4.2.1987, has made a wrong statement that inspite of continuous efforts, the Government had negatived his request and had refused to accord permission. Only after the plaintiffs called upon the defendant to produce the order refusing permission, the defendant sent the communication of the competent authority dated 3.3.1986 with his reply notice dated 6.3.1987, nearly one year after the communication. Therefore, it is obvious that the defendant was keeping this communication to himself without

taking further steps immediately. While he had been agitating about this issue before this court in the writ petition, he has chosen to withdraw the application filed seeking permission.

17. The main defence of the appellant is based on the Full Bench decision in GOPIRATHANAM's case referred to earlier. Therefore, it has become necessary to go through the law enunciated in the Full Bench decision.

18. The Full Bench, in the said case, was concerned with the question of an agreement of sale in reference to the land declared excess. The question referred to the Full Bench was whether there can be a decree for specific performance subject to certain conditions or subject to the grant of exemption. The referring Bench did not agree with the view that courts, in passing a decree for specific performance, cannot lend support to the parties to enforce the agreement so as to defeat the purpose of the Act, in particular, Section 6 of the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978 in the light of the judgment of the Supreme Court in JAMBU RAO SATTAPPA KOCHERI VS. NEMINATH APPAYYA HANAMANNAYYAR [A.I.R. 1968 S.C. 1358]. The Full Bench answered the question to the effect that a decree for specific performance of a contract cannot be granted if it violates Section 6 of the Tamil Nadu Land Ceiling Act. It was also held that Section 6 of the said Act not only prohibits a completed transfer, but also a proposed transfer. Their lordships had taken the following view :

"We also hold that a decree for specific performance of a contract cannot be granted conditionally upon the vendor satisfying certain conditions if it is not part of the agreement."

The Full Bench distinguished the judgment of the Supreme Court in JAMBU RAO's case referred on the ground that the Bombay Tenancy and Agricultural Lands Act is entirely different from the Tamil Nadu Land Ceiling Act.

19. After going through the judgment, we find that the decision of the Full Bench will not apply to the facts of the present case for the following reasons :

(1) The lands under the contract in the case dealt with by the Full Bench were admittedly in excess of the ceiling limit under the Tamil Nadu Act, whereas it is not the case here.

(2) The Full Bench distinguished the judgment of the Supreme Court in JAMBU RAO's case, referred above, since there was no prohibition for transferring the land under the Bombay Tenancy and Agricultural Lands Act, whereas it is so under Section 6 of the Tamil Nadu Act. Similar is the case on hand where there is no total prohibition for transfer of the land as already stated earlier.

(3) In the present case, the parties have understood that the lands are coming within the ceiling limit and proceeded on that basis. Further, there was stay of the declaration of a portion of land as excess and the matter was on remand. The repealing Act makes the whole proceedings abated. Therefore, there is no bar for granting the decree at any stage. The Supreme Court, in JAMBU RAO's case, has categorically laid down the law to the following effect :
"An agreement to sell a land does not, under the Transfer of Property Act, create any interest, in the land, in favour of the purchaser. By agreeing to purchase the land, a person cannot be said in law to hold that land. It is only when the land is conveyed to the purchaser that he holds that land."

(4) The Full Bench has also exempted the grant of decree for specific performance conditionally, if the conditions form part of the agreement, which is the case in the case on hand.

20. In BAIDOSABAI VS. MATHURDAS GOVIND DAS [1980 (3) S.C.C. 545], the Supreme Court rejected the contention that the contract becomes void as soon as the Bombay Tenancy of Agricultural Lands Act became applicable to the suit lands and that it could not be applied after the Act seized to revive the suit lands. It was held that the defendant became entitled to demand that the property should be sold by way of public auction only when the plaintiff obtains possession of the property and that the Act will not be applicable to the lands in question and that there is no impediment in the defendant seeking to enforce the contract. The contention that the court cannot grant a decree to defeat the provisions of the Act cannot be sustained. At any rate, as on date, the Act has been repealed and there is no impediment.

21. The case of P.T. MADAN SWARUP SHROTIA PUBLIC CHARITABLE TRUST

VS. STATE OF U.P. [A.I.R. 2000 S.C. 3145] is one where the proceedings under the Urban Land Ceiling Act declaring the land as surplus was challenged in appeal and on rejection of the appeal, the matter was taken up before the High Court and that too was dismissed. But, in the mean time, the Act had been repealed and a petition was filed praying that the present proceedings have abated. The Supreme Court, in that case, held that since there is nothing on record to indicate that the State had taken possession over the surplus land, the present proceedings have to be abated under the repealed Act. In MANZOOR AHMED MAGRAY VS. GHULAM HASSAN ARAM [1999 (7) S.C.C. 703], while construing the prohibition contained under the J & K (Prohibition on Conversion of Lands and Alienation of Orchards) Act 1975, the Supreme Court held that the prohibition on transfer of orchards is not absolute and that the question of obtaining previous permission as contemplated would arise at the time of execution of the sale deed on the basis of the decree for specific performance. The section does not bar the maintainability of the suit and permission can be obtained by filing a proper application after the decree is passed.

22. In ABDUL RAHIM VS. TUFAN GAZI [A.I.R. 1928 CALCUTTA 584], a Division Bench of the Calcutta High Court has held that where the plaintiff, by his conduct, has made it impossible for the court to give effect to the contract in its entirety, the court will not allow the specific performance of a part of that contract. This was on the principle that a contract for sale of a property, in law, will generally be considered indivisible and the court will not, as a general rule, compel specific performance of a part of the contract unless it can execute the whole contract. The Division Bench also held that it is true, there are exceptions to this rule which may justly be made in the circumstances of a particular case. It was found in that case that the plaintiffs, by their conduct, had made it impossible for the court to give effect to the contract in its entirety in the sense that the defendant failed to perform the demands in accordance with the requirements of Mohammedan Law. This judgment would not support the case of the appellant herein. On the contrary, the Division Bench recognized the exceptions to the rule, and the agreement contemplated permission and that decree could be granted subject to such a permission or in respect of the land coming within the ceiling limit. It is conduct of the defendant which created an apparent inability to perform the contract.

23. The contention of the defendant that he has become incapable of performing the contract and therefore as per Section 16 of the Act a decree cannot be enforced against him, has no force. The judgment relied on by the counsel for the appellant in WILLIAM GRAHAM VS. KRISHNA CHANDRA [1925 PRIVY COUNCIL 45] is of no assistance. In that case, the Privy Council held that court must not make a new contract for the parties nor proceed merely on a surmise that the requirement of the Section would be satisfied if further enquiry were allowed. The Privy Council also took the view that the words of the Section, wide as they are, do not authorize the court to take action otherwise than judicially and in particular, do not permit it to make for the parties or to enforce upon them, a contract, which in substance, they have not already made for themselves. The said view will not apply to the facts of the present case. Neither the defendant became incapable of performing the

contract nor the court is to make a contract for the parties. The question of

making a contract minus the excess area does not arise for consideration in this case since there was no excess and admittedly, the Ceiling Act is not attracted and in any event, the proceedings having been abated.

24. The question of readiness and willingness on the part of the plaintiffs does not arise for consideration either, since it is not the case of the defendant that the plaintiffs were not ready and willing to perform their part of the agreement. The appellant had unilaterally proposed to cancel the agreement on the ground that the Government had negatived his request to accord permission. Therefore, the trial court justifiably did not frame an issue or go into the said question. On the other hand, the conduct of the appellant shows that he had not made a genuine attempt immediately after the agreement and that he withdrew the application for permission. The appellant had admitted in his grounds of appeal that he had, with the sole aim of saving his land from acquisition, wishes to give it to his children and not to sell it to third parties. The inconsistent stand of the appellant is revealed by his filing the writ petition and obtaining a stay and at the same time, trying to convey the same to his children.

25. For all the above reasons, we hold that the judgment of the court below does not call for any interference. The appeal fails and it is accordingly dismissed. However, there will be no order as to costs.

(P.S.M., J.) (P.S.D., J.)

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Index : Yes
Internet : Yes

To
1. The Sub-Court,
Pondicherry
(with records, if any).

2. The Record Keeper,
V.R. Section,
High Court, Chennai.

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